Volume 109
Issue 4 *Dickinson Law Review - Volume 109, 2004-2005*

3-1-2005

Investigation and Discretion: The Terry Revolution at Forty (Almost)

Russell L. Weaver

Investigation and Discretion: The *Terry* Revolution at Forty (Almost)

Russell L. Weaver*

Some decisions are landmarks from the moment they are rendered. *Brown v. Board of Education*,[1] and in particular *Brown II*,[2] fit this characterization. *Brown II* was "at once the Twentieth Century's pivotal judicial event and the Warren Court's paradigm decision."[3] *Engel v. Vitale*,[4] which invalidated prayer in the public schools, set off a firestorm of protest and societal debate.[5] *Gideon v. Wainwright*,[6] while not as significant as *Brown* or *Brown II*, was nevertheless a "landmark" decision because it revolutionized the criminal justice process by extending the right to appointed counsel to indigent defendants in state court proceedings. Finally, *Miranda v. Arizona*[7] turned confessions law upside down by extending the privilege against self-incrimination to pre-adversarial investigatory contexts, and requiring the police to "Mirandize" suspects prior to custodial interrogation.

While other decisions might not be "pivotal judicial events" at the moment of decision, they can profoundly influence the law over time. Like bourbon and fine wine, some decisions ripen and flourish with age. *Terry v. Ohio*,[8] the so-called "stop and frisk" decision, is the epitome of this latter type of decision. When *Terry* was decided in 1968,

---

* Professor of Law and Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law.

1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. Brown v. Bd. of Educ. II, 349 U.S. 294 (1955).

3. Doug Rendleman, Brown II's *"All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1576 (2004).

4. Engel v. Vitale, 370 U.S. 421, 424 (1962) (invalidating state-imposed prayer in public schools).

5. *See also* Furman v. Georgia, 408 U.S. 238, 256-57 (1972) (striking down the State of Georgia's death penalty statute under the Eighth Amendment to the U.S. Constitution's provision prohibiting "cruel and unusual punishment").

6. 372 U.S. 335 (1963) (requiring state-appointed counsel for indigent defendants).

7. 384 U.S. 436, 467 (1966) (requiring the reading of a *Miranda* warning prior to custodial interrogation).

8. 392 U.S. 1 (1968).

commentators would not have regarded that decision as momentous as *Brown I* or *Brown II*. Nevertheless, *Terry* has dramatically reshaped search and seizure law over time. Although the *Terry* holding itself was not earth shattering (the decision did nothing more than articulate the so-called "stop and frisk" exception to the warrant requirement), *Terry*'s analytical framework, which focused on a balancing of governmental need against the intrusion on personal interests,[9] reshaped Fourth Amendment doctrine in important respects and led to a significant expansion of police investigative power and discretion. Today, more than a third of a century later, *Terry*'s influence has yet to run its course. Each year, new decisions emerge that fly *Terry*'s banner.[10]

Under the Fourth Amendment, the Court has historically imposed a warrant preference for searches,[11] and has generally assumed that warrantless searches are unconstitutional.[12] Despite the warrant preference, the touchstone under the Fourth Amendment has always been reasonableness,[13] and warrantless searches or seizures are invalidated only when it is "unreasonable" to proceed without a warrant. *Terry* was important because it was the first decision to "recognize[] an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause."[14] *Terry*'s progeny have gone on to define the "rubric" of relationships between the citizenry and the police. In addition to clarifying when the police can make an investigative stop of someone on the street, at an airport,[15] or in an automobile,[16] the Court has used *Terry*'s analytical framework to define when the police may force a suspect to go to the police station for questioning[17] or fingerprinting.[18] In addition, *Terry* has been used to establish rules governing seizures of personal property,[19] as well as the so-called "special needs" exception to

9. *See id.* at 20-21. "It is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'" *Id.*

10. *See* Hiibel v. Sixth Jud. Dist. Ct., 124 S.Ct. 2451, 2458 (2004); *see also* Illinois v. Lidster, 540 U.S. 419, 426-27 (2004) (addressing the constitutionality of checkpoint stops).

11. *See* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 61-62 (2004).

12. *See id.*

13. See *id.* at 89.

14. Dunaway v. New York, 442 U.S. 200, 208-09 (1979).

15. *See* Florida v. Royer, 460 U.S. 491, 501-08 (1983); United States v. Mendenhall, 446 U.S. 544, 553-57 (1980).

16. *See* Delaware v. Prouse, 440 U.S. 648, 653-58 (1979).

17. *See Dunaway*, 442 U.S. at 212-16.

18. *See* Davis v. Mississippi, 394 U.S. 721, 727-28 (1969).

19. *See* United States v. Place, 462 U.S. 696, 706-07 (1983).

the warrant requirement.[20]

This article does two things. First, it briefly traces the background of *Terry,* and analyzes post-*Terry* developments, as well as the resulting expansion of police discretion and power. Second, in the short space allotted, it offers some analysis of *Terry*'s implications for Fourth Amendment analysis.

I. The Development of *Terry* Principles

In creating the stop and frisk exception, and in determining the appropriate balance between the police and the citizenry, the *Terry* Court weighed the need for the search and seizure against the level of intrusion on the individual.[21] Although *Terry* did not originate the balancing approach,[22] it was the first decision to apply that approach to police-citizen encounters.

Terry illustrates the test's application. In *Terry*, the Court found a governmental interest in "effective crime prevention and detection" because the officer believed that a "stick-up" might be in progress. Since robbers typically carry weapons, the officer concluded that the suspects might be armed and dangerous. As a result, the officer, believing that immediate action was needed, was entitled to take steps to assure himself that the person with whom he was dealing was not armed with a weapon that could unexpectedly and fatally be used against him or others,[23] and therefore was allowed to stop the individuals to make inquiry. When the inquiry failed to dispel the officer's suspicions, the officer was free to "frisk" the suspects.

Post-*Terry* decisions have frequently applied the need-intrusion framework to define police-citizen relations in an array of contexts. Many of these decisions are in line with *Terry*'s conclusion that there is an "entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure."[24] In a number of post-*Terry* cases, the Court

---

20. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 830-34 (2002).

21. *See supra* note 9.

22. *See* Camara v. Mun. Ct. of San Francisco, 387 U.S. 523, 528-32 (1967) (the Court used this analytical approach (the need versus intrusion test) to alter the definition of probable cause as applied to administrative inspections).

23. *Terry*, 392 U.S. at 30.

24. *Id.* at 20; *see also* Michigan v. Long, 463 U.S. 1032, 1049 (1983) (*citing Terry*, 392 U.S. at 21) ("[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in

has not only dispensed with the warrant requirement, but it has even dispensed with the requirement of probable cause, and held that the police may take investigative action based on only a "reasonable suspicion" of criminal activity.[25] The Court has defined "reasonable suspicion" as involving "something more than an 'inchoate and unparticularized suspicion or hunch,'" but "considerably less than proof of wrongdoing by a preponderance of the evidence."[26] In a few cases, the Court has even dispensed with the "reasonable suspicion" requirement.[27]

A. Motorist Stops

A number of post-*Terry* decisions have discussed police authority to stop motorists. In *Delaware v. Prouse*,[28] the Court held that the police could not stop motorists simply to check their license and registration,[29] but could stop motorists based on a "reasonable suspicion" that criminal activity is afoot.[30] Of course, a "reasonable suspicion" of criminal activity can involve something serious (e.g., possession of an illegal firearm), but it may also involve quite minor matters, such as the violation of a traffic regulation.[31]

Terry has also helped create rules governing interactions during motorist stops. In *Pennsylvania v. Mimms*,[32] the Court held that a police officer may, as a matter of course, order the driver of a lawfully stopped

---

believing that the suspect is dangerous and the suspect may gain immediate control of weapons.").

25. *See* Florida v. Royer, 460 U.S. 491, 498 (1983); United States v. Mendenhall, 446 U.S. 544, 560 (1980) (Powell, J., concurring) (Court felt no need to apply the need versus intrusion test because the Court concluded that Mendenhall had not been seized.).

26. United States v. Sokolow, 490 U.S. 1, 7 (1989) (*citing Terry*, 392 U.S. at 27).

27. *See* Illinois v. Lidster, 540 U.S. 419, 424 (2004).

28. 440 U.S. 648, 656 (1979).

29. *See id.* at 656-63 (1979). Although the Court recognized that vehicular traffic presents danger to life and property, and even though the Court agreed that the states have a vital interest in ensuring that drivers are licensed and that vehicles are fit for safe operation, the Court held that the stop was invalid, ruling that the state could use alternative mechanisms for ensuring these ends (e.g., the police could stop motorists for "observed violations" and could check licenses and registrations at that time). The Court concluded that the incremental contribution of random stops was insufficient to justify giving police the unbridled discretion to stop motorists. *See id.*

30. *See id.* at 656.

31. For example, in *Whren v. United States*, 517 U.S. 806 (1996), two undercover police officers were patrolling in a "high drug area" when they witnessed respondent driving in an unusual manner (he sat for an unusually long time at a stop sign, and then took off at a high rate of speed). The officers stopped him for a traffic violation. Defendants eventually argued that the stop was pretextual, but the Court rejected that argument. *Id.* at 809.

32. 434 U.S. 106, 110 (1977).

car to exit the vehicle. In *Maryland v. Wilson*,[33] the Court extended this rule to passengers. In *Wilson*, the Court held that the officer validly ordered the defendant to exit the vehicle, citing the interest in officer safety and noting that the fact that there was more than one person in the vehicle increased the "possible sources of harm to the officer."[34] The Court concluded that, in a situation such as the one in *Wilson*, the intrusion on passengers is minimal, and the motivation of a passenger to use violence to prevent detection of and apprehension for a crime is great.[35]

The Court has also used *Terry*'s analysis to hold that traffic roadblocks and checkpoints are permissible even without a reasonable suspicion of criminal activity.[36] For example, in *Michigan v. Sitz*,[37] the Court upheld sobriety checkpoints at which the police stopped all vehicles and briefly examined drivers for signs of intoxication. Despite recognizing that the checkpoints constituted Fourth Amendment seizures, the Court upheld the checkpoints because of the strong governmental interest in preventing drunk driving and the slight intrusion caused by the brief stops.[38] Likewise, in *United States v. Martinez-Fuerte*,[39] the Court upheld immigration checkpoints established close to the U.S. border, which were designed to detect the presence of illegal aliens in automobiles. However, in later cases, the Court limited police authority to establish roadblocks for other purposes.[40]

B. Other Police-Citizen Investigative Encounters

Terry has also been used to justify investigative stops of individuals in a variety of other locations, including on the street and in airports;[41]

33. 519 U.S. 408 (1997).
34. *Id.* at 413.
35. *Id.* at 414-15.
36. *See, e.g.*, Michigan v. Sitz, 496 U.S. 444, 449-50 (1990).
37. *Id.* at 447.
38. *Id.* at 450-51.
39. 428 U.S. 543, 545 (1976).
40. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 41-42 (2000).
41. *See* Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544, 555 (1980) (the Court felt no need to apply the need versus intrusion test because the Court concluded that Mendenhall had not been seized). In *United States v. Sokolow*, 490 U.S. 1, 3 (1989), the Court found a "reasonable suspicion of criminal activity" when a suspect: (1) paid $2,100 for two airplane tickets from a roll of $20 bills; (2) traveled under a name that did not match the name under which his telephone number was listed; (3) was originally destined for Miami, a source city for illicit drugs; (4) stayed in Miami for only forty-eight hours, even though a round-trip flight from Honolulu to Miami takes twenty hours; (5) appeared nervous during his trip; and (6) checked none of his luggage. A number of other cases have involved the use of these so-called drug courier profiles. In both *Royer* and *Mendenhall*, these profiles provided the basis for the stops. In *Sokolow*, the Court upheld the use of drug courier profiles, saying: "A court

post-*Terry* cases have sought to define the scope of police conduct during such stops. For example, in *Dunaway v. New York*, the Court held that, if the police want to pick up a suspect and take him to the station for questioning, they must have probable cause.[42] In *Davis v. Mississippi*, the Court held that probable cause is also required when the police force a suspect to go to the station for fingerprinting.[43] In *Hayes v. Florida*, in dicta, the Court suggested that when fingerprinting is done in the field as part of a brief detention, it might be justified based on only a reasonable suspicion of criminal activity.[44] In both *Hiibel v. Sixth Judicial District Court*[45] and *Brown v. Texas,*[46] the Court has held that suspects can be forced to identify themselves based on merely a "reasonable suspicion" that they are involved in criminal activity.

Terry's analysis has also been used to define the scope and length of investigative seizures of persons and property. In *United States v. Place*,[47] when Place refused to consent to a search of his luggage, drug agents held the luggage for ninety minutes while they waited for a "sniff test" by a narcotics detection dog. When the dog reacted positively, the agents kept the bags until Monday morning (the sniff took place late on a Friday afternoon) when they obtained a search warrant from a judge. The subsequent search revealed cocaine. The Court recognized that warrantless seizures of property are permissible when the police have articulable facts suggesting that luggage may contain narcotics and that the governmental interest in seizing the luggage briefly to pursue further investigation is "substantial" and perhaps even "compelling" given the suspected involvement in drug trafficking.[48] Nevertheless, the Court concluded that the seizure in *Place* was unconstitutional because of the ninety-minute delay, which the Court regarded as too intrusive.[49] The

---

sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent." *Id.* at 10.

42. 442 U.S. 200, 216 (1979).

43. 394 U.S. 721, 727 (1969).

44. 470 U.S. 811, 817 (1985).

45. 124 S.Ct. 2451, 2458 (2004).

46. 443 U.S. 47, 51 (1979).

47. 462 U.S. 696 (1983).

48. *Id.* at 703. The Court held that the police may seize containers without probable cause when they seek a warrant because "the risk of the item's disappearance or use for its intended purpose before a warrant may be obtained outweighs the interest in possession." *Id.* at 701-02.

49. Based on a reasonable conclusion that a traveler's luggage contains narcotics, the police could briefly detain the luggage for investigative purposes "provided that the investigative detention is properly limited in scope." *Id.* at 706. Although a canine sniff does not qualify as a search, but only a seizure, the Court concluded that "the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his

Court emphasized that the agents had advance notice of Place's arrival and could have prepared for the additional investigation.[50] The additional step, of holding the bags over the weekend, was also deemed to be unreasonable.

Other decisions have involved similar issues. In *Florida v. Royer*, the Court invalidated an officer's decision to take a drug suspect to the DEA office.[51] The Court held that removal to an office was too intrusive and suggested that the police could have confirmed or denied their suspicions by using a narcotics detection dog. In *United States v. Sharpe*,[52] the Court rejected a court of appeals decision holding that investigative stops could last no longer than twenty minutes. The Court concluded that there is "no rigid time" limit on *Terry* stops.[53] In evaluating stops, courts must consider not only the length and intrusiveness of the stop, but also "the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes."[54] The issue is whether the police "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."[55] "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."[56] In *United States v. Van Leeuwen*,[57] the

---

liberty interest in proceeding with his itinerary." *Id.* at 708. "[S]uch a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return." *Id.*

50. The Court stated: "In short, we hold that the detention of respondent's luggage in this case went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics." *Id.* at 710.

51. 460 U.S. at 504-05.

52. 470 U.S. 675 (1985).

53. *Id.* at 685.

54. *Id.*

55. *Id.* at 686.

56. *Id.* at 687. In *United States v. Sokolow*, 490 U.S. 1 (1989), DEA agents believed that Sokolow was a drug courier. Following a brief interrogation, during which Sokolow was unable to produce either his airline ticket or identification, Sokolow was escorted to the DEA office at the airport, where has luggage was examined by a narcotics detection dog. The dog alerted on one of the bags, and the agents obtained a warrant to search it. They found no illicit drugs, but they did find several suspicious documents indicating Sokolow's involvement in drug trafficking. The agents had the dog reexamine the remaining luggage, and this time the dog alerted on a larger bag. By now, it was late evening, and the police could not obtain a second warrant. They allowed Sokolow to leave for the night, but kept his luggage. The next morning, the agents obtained a warrant and found 1,063 grams of cocaine inside the bag. *Id.* at 5. Sokolow challenged the search on the basis that the police failed to use "the least intrusive means available to verify or dispel their suspicions that he was smuggling narcotics." *Id.* at 10. The Court rejected the challenge and qualified *Royer's* statement about using the least intrusive means available. *Id.* at 11.

57. 397 U.S. 249 (1970).

Court upheld a seizure of suspicious packages and a subsequent search.[58] In so doing, the Court suggested that the police acted appropriately.[59]

C. *Special Rules for Special Contexts*

Terry has also been used to create special rules relating to arrests and the execution of warrants. In *Michigan v. Summers*,[60] the occupant of a house was detained while a search warrant was being executed. The Court held that the warrant rendered the occupant sufficiently suspect to justify his temporary seizure; the "limited intrusion[s] on the personal security" of the person detained was justified "by such substantial law enforcement interests" that the seizure could be made on articulable suspicion not amounting to probable cause.[61] Likewise, in *Maryland v. Buie*,[62] the Court upheld the search of a basement after a suspect emerged from it during a house search. Referencing *Terry*, the Court upheld the search noting the "interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been,

58. In *Van Leeuwen*, respondent mailed two twelve-pound packages at a post office near the Canadian border. One package was addressed to a post office box in California, and the other to a post office box in Tennessee. Respondent declared that they contained coins. Each package was sent by airmail and was registered and insured for $10,000. This type of mailing did not subject them to discretionary inspection. When the postal clerk told a policeman that he was suspicious of the packages, the policeman at once noticed that the return address on the packages was a vacant housing area, and that the license plates of respondent's car were Canadian. The policeman called the Canadian police who in turn called customs officials in Seattle. Customs officials in Seattle called both California and Tennessee and learned that both of the addressees were under investigation for trafficking in illegal coins. A customs official thereupon obtained a search warrant, and the packages were opened and inspected. Respondent was tried for illegally importing gold coins. *Id.* at 249-50.

59. The Court stated that:

> No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained. . . . [O]n the facts of this case—the nature of the mailings, their suspicious character, the fact that there were two packages going to separate destinations, the unavoidable delay in contacting the more distant of the two destinations, the distance between Mt. Vernon and Seattle—a 29-hour delay between the mailings and the service of the warrant cannot be said to be "unreasonable" within the meaning of the Fourth Amendment. Detention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant.

Id. at 253.

60. 452 U.S. 692 (1981).

61. *Id.* at 699.

62. 494 U.S. 325 (1990).

arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack."[63] The Court went on to hold that "as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."[64] To search farther afield, there must "be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."[65] The Court held that the protective sweep involved nothing more than a cursory inspection, and should last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises."[66]

Terry also influenced the outcome in *Segura v. United States*,[67] a case in which the police unlawfully entered and occupied an apartment for nineteen hours while they waited for a search warrant.[68] The Court held that it would have been permissible for the police to seal the apartment from the outside and restrict entry while a warrant was obtained, and that it was likewise permissible for the officers to occupy the premises.[69] Likewise, in *Illinois v. McArthur*,[70] the Court held that the police could temporarily detain a man while seeking a warrant to search his trailer.[71] The Court emphasized that the police had probable cause to believe that the trailer contained contraband, that the contraband would be destroyed before they could obtain a warrant, and that the police imposed only a limited restraint by preventing McArthur from re-entering the trailer unaccompanied by officers while a search warrant

63. *Id.* at 333.
64. *Id.* at 334.
65. *Id.*
66. *Id.* at 335-36.
67. 468 U.S. 796 (1984).
68. *Id.* at 800-01.
69. *Id.* at 814.
70. 531 U.S. 326 (2001).
71. *Id.* at 331. In that case, a woman asked police to accompany her to her trailer so that she could remove her belongings. Although her husband was inside, the officers remained outside. When the woman emerged, she told police that her husband "had dope in there" that he had slipped under the couch. The officer then asked the husband for permission to search the trailer, but the husband refused. One of the officers then remained at the trailer while the other went with the woman to obtain a search warrant. The remaining officer prevented the man from re-entering his trailer without a police officer. A subsequent search pursuant to warrant revealed marijuana and drug paraphernalia. *Id.* at 328-29. McArthur moved to suppress the pipe, box, and marijuana on the ground that they were the "fruit" of an unlawful police seizure, namely, the refusal of the police to let him reenter the trailer unaccompanied. According to McArthur, reentry would have permitted him to "have destroyed the marijuana." *Id.* at 329.

was obtained and executed.[72]

D. Special Needs Exception

Post-*Terry* cases have also used the need-intrusion test to create the so-called "special needs" exception to the warrant requirement. Some of these special needs permit searches cognizable under the Fourth Amendment without requiring a warrant, probable cause, or reasonable suspicion. As the Court stated in *National Treasury Employees Union v. Van Raab*:[73]

> [O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.[74]

In *Van Raab*, the Court used the test to uphold a drug-testing program that analyzed urine specimens of employees who applied for promotion to positions involving interdiction of illegal drugs, requiring them to carry firearms or handle classified materials.[75] Finally, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,[76] the Court upheld a high school drug testing policy for students involved in extra-curricular activities.[77] No articulable suspicion or case was required for the test.[78]

II. Some Reflections Regarding *Terry* and the Need-Intrusion Test

Is there reason to fear the growth and development of *Terry*'s progeny and the Supreme Court's aggressive use of the need-intrusion test? As the foregoing discussion reveals, that test has significantly altered the landscape of Fourth Amendment analysis.

A. Racial Profiling Concerns

One major concern with *Terry* and its progeny is that these decisions create a significant potential for racial profiling. In a number of cases, the Court has suggested that the police may act without a

72. *Id.* at 331-33.
73. 489 U.S. 656 (1989).
74. *Id.* at 665-66.
75. *Id.* at 660-63, 677.
76. 536 U.S. 822 (2002).
77. *Id.* at 826, 838.
78. *Id.* at 837.

warrant and even without probable cause.[79] In some cases, nothing more than a "reasonable suspicion" of criminal activity is involved.[80] Difficulties arise because "reasonable suspicion" is a much easier standard to satisfy than probable cause.[81] By giving police greater latitude, *Terry* gives the police a freer hand to engage in racial profiling, allowing them to harass and intimidate minority populations. The disproportionate numbers of racial minorities with below-average economic resources are more likely to live in crime-ridden areas than their white counterparts, and are more likely to be stopped and frisked.

B. Does Terry *Create a Slippery Slope?*

An array of police practices that might have been regarded as questionable or illegal prior to Terry are now clearly legal. Sobriety checkpoints are, for example, permissible. Moreover, the propensity of the Court to employ the *Terry* analysis has created the potential for additional change. In the future, the *Terry* analysis could be used to justify some fairly serious and significant intrusions on individual rights.

As the prior discussion reveals, *Terry*'s analysis has slowly and steadily eroded both the warrant presumption and the requirement of probable cause. In a number of cases, the Court has held that the police may conduct a search or a seizure based only on a "reasonable suspicion" of criminal activity.[82] In later cases, the Court has held that not even a "reasonable suspicion" of criminal activity is required. Police can act if the public interest is great enough and if the intrusion on the individual's rights is not too great.[83] As a result, motorists can be stopped at traffic checkpoints simply to further the governmental interest in eradicating drunk driving.[84]

A number of the decisions of the Court comprising the *Terry* line of cases make much sense. *Terry* itself fits this characterization. In *Terry*,

---

79. *See* United States v. Mendenhall, 446 U.S. 544, 557 (1980) (permitting suspicionless search based on the consent of the person searched); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (requiring that police possess a reasonable suspicion of unlawful activity to stop a vehicle and detain its driver).

80. *See Prouse*, 440 U.S. at 663.

81. The Court has defined "reasonable suspicion" as involving "something more than an "inchoate and unparticularized suspicion or 'hunch,'" but "considerably less than proof of wrongdoing by a preponderance of the evidence." United States v. Sokolow, 490 U.S. 1, 7 (1989).

82. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 663 (1979) (applying this test in the context of vehicle stops).

83. *See, e.g.*, Bd. of Ed. of Ind. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 830 (2002) (applying test calling for "a fact-specific balancing of the intrusion on . . . Fourth Amendment rights against the promotion of legitimate governmental interests").

84. *See* Michigan v. Sitz, 496 U.S. 444, 447-48, 454 (1990).

the policeman had reason to believe that suspects were casing a store in preparation for a robbery.[85] Since robbers usually carry weapons, he also had reason to believe that the suspects were armed.[86] Although the officer could have waited until the suspects began the robbery before intervening, that course of action might have resulted in the injury of innocent people.[87] Under the circumstances, it made sense for the officer to have stopped the suspects to make inquiry.[88] When the stop failed to resolve his concerns, it made sense for the officer to conduct a limited search—a pat down—for weapons.[89] Other decisions also seem to make sense. For example, as in *Summers*, when the police execute a warrant, it makes sense to detain occupants of the house who could attempt to thwart the search.[90]

Despite the reasonableness of some of the post-*Terry* decisions, the need-intrusion test has troubling implications and ramifications. Suppose, for example, that a sniper engages in a killing spree (such as occurred in the Washington, D.C. area a few years ago), or that a serial killer has been murdering young children (such as happened in Atlanta a decade or so ago). In both situations, the governmental and societal interest in apprehending the murderers would be very high, and could theoretically be used to justify significant intrusions upon individual liberties. How far could the police go? The Court's willingness to apply *Terry*'s permissive analysis makes this an open question. Could the police establish roadblocks to try to gather information? Could they search vehicles at the roadblocks? Could they search houses of suspects based only on a "reasonable suspicion" of criminal involvement, or would a warrant or probable cause be required?

These scenarios are not far fetched. The Court has already held or suggested that roadblocks would or should be upheld in two different contexts. In, for example, *City of Indianapolis v. Edmond*,[91] the Court suggested that roadblocks might be permissible when necessary to thwart terrorists or to apprehend fleeing criminals.[92] In other words, the Court

85. Terry v. Ohio, 392 U.S. at 7.
86. *Id.*
87. *Id.* at 24.
88. *Id.* at 22-23.
89. *Id.* at 27.
90. Michigan v. Summers, 452 U.S. at 701-05.
91. 531 U.S. 32 (2000).
92. *See id.* at 44:

> Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example . . . the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route. The exigencies created by

indicated that large numbers of motorists can be stopped even though the police do not have probable cause, or even a "reasonable suspicion," that any particular motorist was involved in criminal activity.[93]

Moreover, although the Court has upheld roadblocks and other checkpoints for limited purposes such as sobriety checks, the Court refused to uphold drug interdiction checkpoints. In *Edmond*, the police set-up drug checkpoints similar to the drunk-driving checkpoints designed to detect illegal narcotics.[94] The officer would look for signs of impairment, conduct a plain view examination of the vehicle from the outside, and walk a narcotics-detection dog around the outside of the vehicle.[95] In invalidating the search, the Court emphasized that suspicionless searches and seizures are generally regarded as unreasonable.[96] The Court distinguished the "special needs" situations from the drug interdiction checkpoints on the basis that none of them involved a "checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing."[97] For example, sobriety checkpoints were "clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue."[98] In suggesting that license and registration checkpoints would be valid, the Court focused on the states' "'vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed.'"[99] The Court viewed drug interdiction checkpoints differently because their objective was to "detect evidence of ordinary criminal wrongdoing."[100] Even though the Court recognized

---

these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction. While we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.

Id. (citation omitted).

93. *See id.* (positing police attempts to prevent an imminent terrorist attack or to catch a dangerous fleeing felon as examples of when such analysis might apply).

94. *Id.* at 34-35.

95. *Id.* at 35.

96. *Id.* at 37, 41.

97. *Edmond*, 531 U.S. at 37-38, 41.

98. *Id.* at 39.

99. *Id.* (quoting Delaware v. Prouse, 440 U.S. at 658).

100. *See Edmond*, 531 U.S. at 41-42:

We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must

that other types of roadblocks might result in arrests for crime, the Court viewed such checkpoints differently because they were not "designed primarily to serve the general interest in crime control."[101] The Court was reluctant "to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."[102]

Nevertheless, the *Terry* test probably could be used to justify roadblocks designed to seek information regarding the identity of a sniper or serial killer. In *Illinois v. Lidster,*[103] the Court upheld a roadblock set up simply to seek witnesses and information relating to a crime that occurred earlier in the area.[104] In other words, motorists were subjected to seizure even though the police had no basis for suspecting that they were involved in the crime, or that they were implicated in any way.[105] The police were simply seeking information. Utilizing the need-intrusion test,[106] the Court sustained the roadblocks. It concluded that the public interest was "grave" because someone had been killed, and the police were trying to find the killer.[107] In addition, the stop was tailored

---

be accompanied by some measure of individualized suspicion. We suggested in *Prouse* that we would not credit the "general interest in crime control" as justification for a regime of suspicionless stops. Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

Id. (citation omitted).

101. *Id.*

102. *Id.* at 43:

The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs. Only with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint . . . was designed to eliminate.

Id.

103. 540 U.S. 419 (2004).

104. *Id.* at 422, 427-28.

105. *Id.* at 422.

106. *See id.* at 426-27:

And as this Court said in *Brown v. Texas,* 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), in judging reasonableness, we look to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *See also* Michigan v. Sitz, 496 U.S. at 450-455 . . . (balancing these factors in determining reasonableness of a checkpoint stop); United States v. Martinez-Fuerte, 428 U.S. at 556-564 (same).

107. *Id.* at 427.

to try to find those who might have information about the crime.[108] In addition, the stops were brief so that the intrusion was less significant.[109]

Likewise, in *Michigan v. Sitz*,[110] the Court upheld sobriety checkpoints even though the police had neither probable cause nor a reasonable suspicion that any of the motorists being stopped were intoxicated.[111] If there was no evidence of intoxication, drivers were immediately allowed to pass the checkpoint. If intoxication was detected, the motorist was directed to a nearby location where "an officer would check the motorist's driver's license and car registration and, if warranted conduct sobriety tests."[112] Drivers who were found to be intoxicated were arrested.[113] Despite recognizing that the checkpoints involved Fourth Amendment seizures, the Court upheld the checkpoints because of the strong governmental interest in preventing drunk driving, and the limited intrusion caused by the stops.[114]

Based on the holdings in *Edmond*, *Lidster*, and *Sitz*, it is reasonable to expect that the Court would uphold properly constituted roadblocks designed to unearth information necessary to apprehend a terrorist sniper or a serial killer. The need is strong enough and the intrusion is small enough to justify the roadblocks, assuming that the stops are relatively brief. However, *Edmond* seems to suggest that the current Court would not sustain vehicle searches conducted as a routine component of information-gathering roadblocks.

Would the Court also uphold searches of houses without a warrant based on something less than probable cause? The Court has held that the police may search cars, and sometimes even houses, based only on a reasonable suspicion of unlawful activity. For example, in *Michigan v. Long*,[115] the Court held that the police could search the passenger compartment of an automobile based on an officer's observation of a

---

108. *See id.*:

> The stops took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night. And police used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred.

Id.

109. *Lidster*, 540 U.S. at 427-28 ("Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line—a very few minutes at most. Contact with the police lasted only a few seconds.").

110. 496 U.S. 444 (1990).

111. *Id.* at 449-50 (distinguishing authority requiring the government to demonstrate that the police had some degree of individualized suspicion as to detainees).

112. *Id.* at 447.

113. *Id.*

114. *Id.* at 451, 455.

115. 463 U.S. 1032 (1983).

knife in the backseat.[116] *Long* upheld such a search even though it was not illegal to possess the knife, and even though there was no evidence that the suspect driving the car had threatened anyone with the knife.[117] The police were allowed to assume that their safety was in danger based upon the late hour, the rural character of the area, the fact the suspect was intoxicated, and the presence of the knife.[118] Likewise, in *Maryland v. Buie*,[119] the Court upheld a search of the defendant's basement to ensure that an accomplice was not present there who could launch an attack upon the officers apprehending the defendant.[120]

However, cases like *Long* and *Buie* do not suggest that the police have carte blanche to search suspects' homes based upon a mere reasonable suspicion of criminal activity. Both cases arose in specific contexts—emergency situations arising on the road or in a house—and neither decision sustained wholesale police authority to enter houses to search without a warrant or probable cause. *Long* involved a roadside stop coupled with evidence that showed that the suspect was armed and intoxicated.[121] Although *Buie* upheld a search based on something less than probable cause, the officers in that case were already legitimately in the house.[122] In other words, neither decision goes so far as to suggest that the police could enter a home without a warrant or probable cause merely to search for evidence, and neither suggests that initial entry could be based on nothing more than a "reasonable suspicion" of involvement.

Nevertheless, there can be no doubt that *Terry*'s analysis could be used to justify some of the more severe intrusions discussed above; routine searches conducted pursuant to roadblocks, or home searches designed to apprehend a terrorist sniper or serial killer, could conceivably be sanctioned under this approach. One would hope that the Court would never interpret *Terry*'s analytical approach so broadly, and so far, the Court has not done so. Nevertheless, since the need versus intrusion test involves a case-by-case approach as opposed to a bright line rule,[123] *Terry* involves the courts in applying general principles (e.g., the "public interest" or need for a search) to varying factual situations.

Just as beauty is in the eye of the beholder, case-by-case analysis

116. *Id.* at 1049.
117. *Id.* at 1032, 1036.
118. *Id.* at 1050-51.
119. 494 U.S. 325 (1990).
120. *Id.* at 328, 334.
121. 463 U.S. at 1050-51.
122. 494 U.S. at 328, 334.
123. *Compare, e.g.,* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) and Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (imposing bright-line rules), *with* Illinois v. Gates, 462 U.S. 213, 233, 238-39 (1983) (calling for case-by-case approach).

can vary depending upon which judge applies the law to the facts. As a result, in the hands of judges who tend to favor law-enforcement interests over assertions of constitutional violations, the *Terry* need-intrusion test creates the potential for a slippery slope that can lead to a significant erosion of Fourth Amendment rights. Recent "special needs" cases illustrate the slippery slope. For example, in *Earls*, the Court upheld drug tests of students involved in extra-curricular activities.[124] The alleged governmental need for the tests was nebulously stated,[125] and the Court downplayed the nature and extent of the intrusion.[126]

III. Conclusion

Terry v. Ohio—and particularly the balancing test invoked in that case—has led to a large-scale revision of Fourth Amendment doctrine. Prior to *Terry*, the Court generally applied the warrant preference in evaluating the validity of searches and seizures. While arrests were generally sustained without a warrant,[127] and although there were numerous exceptions to the warrant requirement,[128] the warrant preference generally applied. In the brave new world after *Terry*, the Court frequently dispenses with both the warrant requirement and the probable cause requirement. Increasingly, searches and seizures are sustained based only upon a finding of a "reasonable suspicion" that the suspect may be involved in criminal activity.[129] In some cases, the Court dispenses altogether with any requirement of individualized suspicion provided that there is a sufficient need or governmental interest in the search or seizure, and that the need or interest is not outweighed by the level of intrusion on the individual.[130]

How far the need-intrusion analysis will be pushed, and whether it will lead to even more severe intrusions upon Fourth Amendment freedoms, remains to be seen. In the hands of a Court that is sensitive to the balance between governmental and individual interests, the test has the potential to do much good. In the hands of an insensitive Court, the *Terry* analysis offers much reason for concern and fear. In addition, whether the *Terry* test will ultimately lead to more racial profiling is unclear.

---

124. 536 U.S. at 826, 838.

125. *See id.* at 835-36.

126. *Id.* at 832-34.

127. United States v. Watson, 423 U.S. 411, 423-24 (1976).

128. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (inventory exception); Chimel v. California, 395 U.S. 752, 768 (1969) (search incident to legal arrest exception); Carroll v. United States, 267 U.S. 132, 155-56, 158-59, 162 (1925) (automobile exception).

129. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

130. *See, e.g., Bd. of Ed. of Ind. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 830 (2002).

***